Supreme Court, U.S.
FILED
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NO. _____

IN THE
SUPREME COURT OF THE
UNITED STATES
OCTOBER TERM 2006

DENNY RHODES - PETITIONER

VS.

THE TOWN OF ALEXANDER,
EDWYN HISE and KARL BENDER

RESPONDENTS

ON APPEAL FROM COURT OF
APPEALS - STATE OF NEW YORK

PETITION FOR WRIT OF CERTIORARI

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STATEMENT

The Petitioner was convicted by the Justice Respondent when Petitioner pled "not guilty" to violating a zoning ordinance; didn't withdraw that plea and also not afforded a trial; that said Petitioner was sentenced to jail for 10 days and fined. He then complained to the Judicial Conduct Commission resulting in sacting of admonition . The lower courts apparently felt the Judge was immuned for his unlawful and illegal acts, as was contended by Respondents.

QUESTIONS PRESENTED

Did the New York State Courts wrongfully deny the Petitioner relief after his civil rights and due process rights under the United States Constitution were violated in the Town Justice; and after the Respondent Judge was sanctioned by the Judicial Conduct Commission?

JURISDICTION

The Decision of the Appellate Division Fourth Department was dated April 28, 2006. Subsequently, an application for permission for leave to appeal to the New York Court of Appeal was denied by decision dated July 5, 2006. Petitioner has 90 days to file this petition. Decisions herein have not as yet been reported.

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STATEMENT OF THE CASE

POINT 1

THE LOWER COURT ERRED IN DISMISSING PETITIONERS CIVIL RIGHTS ACTION AND GRANTING SUMMARY JUDGEMENT ON THE GROUNDS OF JUDICIAL AND QUASI-JUDICIAL IMMUNITY

The Petitioner DENNY RHODES served Notice of Claim on the Respondent TOWN OF ALEXANDER and the action which was commenced against all Respondents on August 30, 2003. Issue was joined by service of an Motion of lieu of an answer and subsequently by service of an Answer.

That an argument on the motion in lieu of an answer was heard before Hon. Robert C. Noonan, Acting Supreme Court Justice of Genesee County, New York, which resulted in his dismissal of the State Court actions as contained in the complaint but upheld the action based on a violation of Federal Civil Rights statutes, on December 8, 2003.

After full discovery herein a further motion was made by Respondents to dismiss the Federal Civil Rights action and said Justice granted summary judgement on April 29, 2005.

A notice of appeal was timely and duly served and filed herein from both orders.

That the Petitioner was charged with a violation of zoning ordinances of the Respondent TOWN OF ALEXANDER and by the zoning inspector Respondent CARL BENDER on March 30, 2000; that Petitioner felt and still feels that Respondents set upon a pattern of harassment in view of the fact that the so called junk and debris was not junk and debris but consisted basically of 6 operable automobiles, two of them registered and other items of property belonging to other persons which Petitioner was repairing for them as an electrician and welder and which were still to be claimed by various owners; that further there were also valuable pieces of metal.

These were located on 280 acres of land owned by Petitioner, concentrated near his home and adjacent barns approximately 100' from the roadway; that none of these items bothered any neighbors, nor did they create anything hazardous or unsightly; nor did neighbors complain to authorities.

During various appearances before the Respondent EDWYN HISE, Petitioner did make a bonafide removal of various items, even though he didn't agree with the charges, including the removal of a 32 foot trailer; even though the Respondent BENDER would report to the Court that Petitioner did nothing.

The result was that after the Petitioner pled "not guilty", to the charge and without a trial, the Respondent EDWYN HISE found him guilty and sentenced him to 10 days in jail and imposed a fine of $350; even though he never changed his plea to "guilty". The Petitioner then filed a complaint with the Judicial Conduct Commission who found in his favor, issuing a decision which resulted in a sanction of admonition against said Respondent.

The Petitioner, thereafter, commenced Action against all three Respondents alleging causes of actions for negligence, intentional torts of malicious prosecution, false arrest, and imprisonment and civil rights violations.

The Lower Court on December 8, 2003 dismissed the state court actions as being untimely and after allowing the Federal Civil Rights actions to proceed as having been commenced with in the 3 year Federal statute, dismissed that action, subsequently, on April 29, 2005 and granted summary judgement.

The authorities are uniform in holding that summary judgement shall not be granted if there is any issue of fact to be determined by the triers of the facts. To hold otherwise would block a plaintiff having his day in Court with such a drastic summary dismissal. This principal of law is so well established that counsel submits it does not require the setting forth of any citations.

The first issue is that of "probable cause" which always has been a question of fact. The lower court found as a matter of law that the Respondent BENDER had "probable cause" in issuing the summons for town zoning law violations. The Petitioner claims that the Respondent TOWN and BENDER have been harassing him since 1993, which culminated in the violation, in question. Even though he disagreed with the zoning ordinances in relation to his situation, after appearances in court, he each time removed some of the items set forth in the violation summons. Further, BENDER at one point informed the Court that nothing was removed when a 32' trailer had been removed by RHODES; hardly unnoticeable!

The Petitioner was so cooperative that he even gave BENDER his pager number but the latter never contacted him.

Further again, all items were contained in Petitioner's 280 acre tract, 100' from the road near his house and bar, not interfering with neighbors nor creating an unsightly hazzard. Even the Deputy who served him with the summons commented he didn't see anything wrong with his property.

Counsel submits, therefore, that there certainly is a question of fact on the probable cause issue herein.

With regards to the second issue the court further found privilege, quasi-privilege and absolute or qualified immunity. None of these protect a judge, a municipality or quasi-judicial officer where illegal or unlawful acts were committed. In the case of a judge that has never been considered to be within his jurisdiction.

None of the Cases cited by the Lower Court apply to the facts in our case; nor does counsel have any quarrel with those cases.

There are many cases where judges have been removed for routinely failing to advise defendants of their constitutional rights. In Re Elsworthy 77 N.Y. 2d. 280; McGee vs. State 59 N.Y. 2d. 870; Scardino vs. State 58 N.Y. 2d. 36 cases hold that immunity is an affirmative defense and does not go to the existence of a cause of action under § 1983 prohibiting the deprivation of civil rights under color of law. Davidson vs. Scully 69 F. 2D.50.

Further, as a general proposition the question of qualified immunity of a State official is a matter for factual resolution Reese vs. Nelson 598 F. 2D. 822; Marks vs. Groff 521 F. 2d. 1376; Brisk vs. City of Miami Beach Florida 726 F. Supp. 1305; Mason vs. Melendez 525 F. Supp. 27.

See also Pierce vs. Mullnomah County Or. 76 F. 3rd 1032; certiorari denied.

Cases also hold that an action against an official in his individual capacity rather than his official capacity is not barred by the 11th Amendment even though the State or Municipality may ultimately reimburse him. Hafer vs. Melo 502 U.S. 21; Berman Enterprises Inc. Vs. Jorling 3 F. 3rd 602 (2nd Circuit). Also many of the authorities have held the absolute immunity under § 1983 is rare Buckley vs. Fitzsimmons 509 U.S. 259 113 S. Ct. 125; Scotto vs. Almenos 143 F. 3rd 105 (2nd Circuit); Marty's Adult World of New

Britain, Inc. Vs. Guida 453 F. Supp 810.

In the case of Mandell vs. County of Suffolk 316 F 3d 368 (2nd Circuit), Judge Cardamone wrote the majority opinion and reversed and remanded the case for further proceedings and said with regards to "qualified immunity" that:

"Under the doctrine of qualified immunity, a government official performing discretionary functions is shielded from liabilites for civil damages if his conduct did not violate plaintiff's clearly established rights or if it would have been objectively reasonable for the official to believe that his conduct did not violate the plaintiff's rights. Where specific intent of a defendant is an element of plaintiff's claim under clearly established law, and plaintiff has adduced sufficient evidence of that intent to defeat summary judgement, summary judgement on qualified immunity grounds is inappropriate. See Locurto, 264 F. 3d. At 169-70; Sheppard v. Beerman, 94 F 3d. 823, 828 (2d Cir. 1996). In the present case retaliatory intent is an element of plaintiff's claim, and we have already noted that plaintiff's evidence of retaliatory animus is sufficient to make defendants' motivation a triable issue of fact. Until that issue is resolved by a fact finder, therefore, the retaliation claim against defendant Gallagher cannot be dismissed on qualified immunity grounds." and with regards to municipal liability the Court stated:

"A municipal entity may be liable under 42 U.S.C. § 1983 only if the alleged constitutional violation was caused as the entities "policy or custom." Monell vs. Department of Social Services of the City of New York 436 U.S. at 694, 98 S. Ct. 2018. The "policy or custom" requirement, however, is intended simply to distinguish acts of the municipality from acts of its employees in order that the municipal liability be related to conduct for which the municipality is actually responsible. Dangler v. New York City Off Track Betting Corp., F 3rd 130, 142 (2d Cir. 1999). Thus, if the challenged action is directed by an official with "final policymaking authority," the municipally may be liable even in the absence of a broader policy. See Pembauer v. City of Cincinnati, 475 U.S. 469, 481-83, 89 L. Ed. 2d 452 (1986) ("municipal liability attaches only where the decision maker possesses final authority to establish municipal policy with regards to the action ordered.") Here, plaintiff challenges as retaliatory

employment decisions made by Gallagher, who, as the Suffolk County Police Commissioner, had authority to set department-wide personal policies. Gallagher's position provides a sufficient basis for holding the county liable for his adverse decisions with respect to plaintiff."

I respectfully submit to this Court that this was a flagrant error on the part of the New York State Courts and that this court ought to accept this case for review.

CONCLUSION

Based upon the within, this Court should grant the Writ of Certiorari herein on the grounds that no one is immune from unlawful and illegal violations of a persons civil rights.

Respectfully Submitted,

_____

RICHARD D. GRISANTI, ESQ.

STATE OF NEW YORK
SUPREME COURT : COUNTY OF GENESEE

DENNY RHODES,

Plaintiff,

V. Index No. 51380

THE TOWN OF ALEXANDER,
EDWYN HISE AND KARL BENDER,

Defendants.

RICHARD D. GRISANTI, ESQ.
Attorney for Plaintiff

AMY R. COTE, ESQ.
Attorney for Defendants

DECISION AND ORDER

ROBERT C. NOONAN, J.

Plaintiff brought the captioned action against the Town of Alexander, defendant Hise as Town Justice, and defender Bender as Town Zoning Enforcement Officer, alleging negligence and/or the intentional torts of malicious prosecution, false arrest and false imprisonment. By Decision and Order of

December 8, 2003, this Court previously granted defendants' motion to dismiss the complaint as time-barrred (CPLR 3211(A)(5)) to the extent of the state law claims, but permitted the comparable federal claims to go forward (42 USC § 1983). Issue having been joined and discovery conducted, defendants now move for summary judgment dismissing the balance of the complaint on the merits (CPLR §3212). Plaintiff opposes upon the affidavit and memorandum of counsel. Argument was heard at the April 28, 2005 Special Term of this Court.

The limited record submitted on motion reveals that on defendant Bender's complaint, plaintiff was cited, by both appearance ticket and criminal summons, to appear in Town Court for failure to remedy unsightly conditions and unregistered motor vehicles on his property, an alleged violation of the Town Zoning Ordinance. On June 27, 2000, plaintiff appeared without counsel before defendant Justice Hise and, without entering a plea, indicated only that he had been working on cleaning up his property. The matter was then adjourned in contemplation of defendant's compliance with the Zoning Ordinance.

After failing to satisfactorily remedy the situation by September of 2000, the Court was notified by Zoning Enforcement Officer Bender and plaintiff was again directed to appear in Court on October 17, 2000. On that occasion, defendant acknowledged that he had not yet cleaned up his property. In view of what the Court considered an

admission to the underlying allegations, defendant Justice Hise then summarily sentenced plaintiff to a fine of $350.00 and 10 days in jail, without benefit of counsel, plea or trial. Defendant then spent approximately 28 hours in jail before obtaining his release.

While state common law rights may parallel constitutional claims, only the violation of a constitutional right is actionable under 42 USC §1983 (**Ruggiero v. Phillips**, 292 AD2d 41). "To prevail against a government entity or employee in a claim under that section, a plaintiff must demonstrate the existence of '(1) an official policy or custom that (2) causes [the plaintiff] to be subjected to (3) a denial of a constitutional right' " (**Linen v. County of Rensselaer**, 274 AD2d 911, 913; quoting, **Howe v. Village of Trumansburg**, 199 AD2d 749, 751).

While plaintiff undoubtedly had a protected constitutional right to his liberty (**Linen v. County of Renssealaer**, supra), plaintiff's defense to the underlying criminal proceeding was his disagreement in principle with the zoning laws. Plaintiff has failed to raise a genuine issue of fact that defendant Bender did not, as put forward by defendants, have probable cause to lodge a complaint under the existing ordinance based upon the condition of plaintiff's premises. Such probable cause is a complete defense to the federal civil rights action against defendant Bender (**Restey v. Higgins** 252AD2d 954

For his part, respondent Justice Hise was subsequently admonished by the State Judicial Conduct Commission for convicting and sentencing defendant in violation of "fundamental statutory procedures". Nonetheless, although his actions were unauthorized, it does not appear that Justice Hise acted completely outside his jurisdiction since he was the local magistrate having jurisdiction over both the subject matter and person of the defendant. Defendant Justice Hise is therefore immune from personal liability (cf. **Alvarez v. Snyder**, 264 AD2d 27; **Mullen v. State of New York**, 122 AD2d 300; **Word v. City of Mt. Vernon**, 65 AD2d 622; 62ANYJur2d, Government Tort Liability §144).

Finally, absent an official custom or policy, a municipality such as the Town of Alexander cannot be held liable for violation of an individual's federal civil rights solely because it employs a torfeasor (**Monell v. Department of Social Services**, 436 US 658; **Brown v. City of New York**, 289 AD2d 95; **Schulik v. County of Monroe**, 202 AD2d 960; **Howe v. Village of Trumansburg**, supra).

Accordingly, defendants are entitled to summary judgment dismissing the balance of plaintiff's complaint. Submit Judgment accordingly.

Dated: April 29, 2005
Batavia, New York

"s/ _____"
HON. ROBERT C. NOONAN
Acting Supreme Court Justice

GRANTED:
Date: 4/29/05

"s/ _____"
COURT CLERK

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

479
CA 05-01927
PRESENT: PIGOTT, JR., P.J. HURLBUTT, GORSKI, MARTOCHE, AND HAYES, JJ.

DENNY RHODES, PLAINTIFF-APPELLANT,

V

TOWN OF ALEXANDER, EDWYN HISE AND CARL BENDER, DEPFENDANTS-RESPONDENTS.

RICHARD D. GRISANTI, ARCADE, FOR PLAINTIFF-APPEALLANT.

GALLO & IACOVANGELO, LLP, ROCHESTER (CHRISTIAN A. CATALANO OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Genesee County (Robert C. Noonan, A.J.), dated April 29, 2005. The order granted defendants' motion for summary judgment dismissing the complaint.

It is hereby ORDERED that the order so appealed from be and the same hereby is unanimously affirmed without costs for reasons stated in decision at Supreme Court.

Entered: April 28, 2006

JoAnn M. Wahl
Clerk of the Court

Supreme Court
APPELLATE DIVISION,
Fourth Judicial Department,
Clerk's Office, Rochester, N.Y. }

I, JOANN M. WAHL, Clerk of the Appellate Division of the Supreme Court in the Fourth Judicial Department, do hereby certify that this is a true copy of the original order, now on file in this office.

SUPREME COURT
APPELLATE DIVISION
DEPARTMENT

IN WITNESS WHEREOF, I have hereunto set FOURTH my hand and affixed the seal of said Court in the City of Rochester, New York, this APR 28 2006

"s/ _____"

Clerk

State of New York,
Court of Appeals

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the .....fifth.....**day of** .....July.....2006

Present, HON. JUDITH S. KAYE, Chief Judge, presiding.

4-10 Mo. No. 607
Denny Rhodes,

Appellant,

v.

Town of Alexander, et al.,

Respondents.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied with one hundred dollars costs and necessary reproduction disbursements.

"s/ "
Stuart M. Cohen
Clerk of the Court

At a special term of the Supreme Court of the State of New York held in and for the County of Genesee, Batavia, New York on the 28th day of April, 2005.

PRESENT : Honorable Robert C. Noonan
Supreme Court Justice

STATE OF NEW YORK
SUPREME COURT : COUNTY OF GENESEE

DENNY RHODES,

Plaintiff,

V. Index No. 51380

THE TOWN OF ALEXANDER,
EDWYN HISE AND KARL BENDER,

Defendants.

Upon reading the Notice of Motion, dated March 4, 2005, of the Defendants, THE TOWN OF ALEXANDER, EDWYN HISE, and KARL BENDER, seeking summary judgment dismissing the Plaintiff's Complaint, with supporting Affirmation of Amy R. Cote, Esq., dated March 4, 2005, and the exhibits annexed thereto, served in support of the Motion; and the Opposing Affidavit of Richard D. Grisanti, Esq., dated "April ___, 2005," served on behalf of the Plaintiff in opposition to the Motion;

And, the Motion having duly come before the Court for oral argument, at the above-referenced Special Term thereof, and the Plaintiff having appeared by Richard D. Grisanti, Esq.; and the Defendants having appeared by Gallo & Iacovangelo, LLP, Amy R. Cote. Esq., Of Counsel; and after due deliberation the Court having rendered its Decision and Order, dated April 29, 2005, a copy of which is annexed hereto as **Exhibit "A;"** it is hereby

ORDERED that the Defendants motion is granted dismissing

the Plaintiff's Complaint in its entirety; and it is further

ORDERED that the requirement for filing of papers considered in connection with this motion is hereby dispensed with pursuant to CPLR §2220.

Dated: Batavia, NY
May12, 2005

ENTER

"s/"
Hon Robert C. Noonan
Supreme Court Justice(Acting)

GRANTED
May 12, 2005
"s/"
COURT CLERK